Supreme Court of the United States

OCTOBER TERM, 1943.

No. 217.

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER AND LUTHER BLACK, PETITIONERS,

VS.

HOLLY HILL FRUIT PRODUCTS, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

I. OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 136 F. 2d 323, *Holly Hill Fruit Products, Inc.*, v. *Addison et al.*, and the opinion of the District Court is not reported but the findings are on pages 186-198 of the record and the final judgment is on pages 211-215 of the record.

II. STATEMENT OF THE CASE.

Rather than to attempt to point out the many inaccuracies or omissions in the statement of the case by the Petitioners, and believing the same does not give such a complete and fair statement as to enable this Court to a consideration of all the matters presented, Respondent states the case as follows:

A. Exemption Under Section 13(a)(10).

The Respondent is a cooperative corporation organized and existing under the cooperative laws of the State of Florida and engaged in the canning of citrus fruits at Davenport, Florida (R. 13, 224). Five of its employees instituted this suit in the United States District Court for the Southern District of Florida, for underpay, overtime and statutory penalties under Sections 6 and 7 of the Fair Labor Standards Act, 29 U. S. C. A. 201 *et seq.*, 52 U. S. Stat. 106 *et seq.*, for the two canning seasons 1938-39 and 1939-40 (R. 2, 225). However, it developed that the Respondent had at all times paid the minimum wage required by the Act and, therefore, the judgment did not include any underpay (R. 212-215). The Respondent, answering the complaint, contended that the wage and hour requirements of the Act (Sections 6 and 7) were not applicable to its employees for the two seasons involved because of the exception provided for by Section 13(a)(10) (Fifth Defense, R. 13, 225) and also filed other defenses consisting of a denial of the material allegations of the complaint (Second Defense, R. 7-10), claiming the benefits of the partial exemption from the hours provision of the Act as granted under Section 7(b)(3) (Third Defense, R. 10-12) and claiming the benefit of the total exemption for a limited time from the hours provision of the Act as granted under Section 7(c) (Fourth Defense, R. 12-13).

The District Court, after taking testimony on the issue of whether the employees were within the exception provided by Section 13(a)(10), ruled against the Respondent holding the employees were subject to the Act and without taking testimony ruled that the defenses setting up Sections 7(b)(3) and 7(c) were insufficient (R. 186-198) and entered final judgment for overtime, penalties and attorneys' fees (R. 211-215). The Respondent appealed to the Circuit Court of Appeals which held

(1) that the portion of the definitions by the Administrator of the Wage and Hour Division limiting to seven the number of employees in the establishment before it could be within the area of production and, therefore, entitled to the exception, was a void limitation, following its former decision in *Fleming* v. *Farmers Peanut Company*, 128 F. 2d 404; and

(2) applied the particular facts of the case to the definitions with the number of employees limitation deleted, and held that, under the particular facts, the operations of the employees, during the two seasons involved, were within the definitions, therefore within the exception and not covered by the Act (R. 224, 231).

Section 13(a)(10) of the Fair Labor Standards Act provides that Sections 6 and 7 of the Act shall not apply to an individual engaged in certain operations, including the canning of agricultural and horticultural commodities within the area of production (as defined by the Administrator). It is admitted that the employees were engaged in the operations described in Section 13(a)(10) and in the definitions and the sole question in this case was whether these activities were within the area of production as defined by the Administrator.

The Act went into effect on October 24, 1938, and the Administrator promulgated his first regulation (definition) defining area of production on October 20, 1938 (Appendix to this brief 75), which definition was

amended in April, 1939, and, thereafter, the Administrator redefined the phrase "area of production" from time to time (App. 75-79).

The season for the canning of citrus in Florida runs from approximately November 1st to June 1st of the following year (R. 187—Findings of the Court) and this suit involves the two seasons of 1938-39 and 1939-40. During these two seasons, the Respondent operated its establishment from November 14, 1938, to May 26, 1939, and from November 16, 1939, to March 30, 1940 (R. 187).

For the two seasons involved there was in effect the first definition of the Administrator, his amendment of April, 1939, and the second definition (App. 75).

In his first definition, he defined the territory from which the commodity was to be obtained as "immediate locality" and in the second definition as "general vicinity." Realizing the phrase "immediate locality" needed clarification, he issued an amendment providing that "immediate locality" should not include any distance of more than ten miles and that the establishment must be located within a town of 2,500 or less population. "Immediate locality" was not defined in the first definition and the equally ambiguous expression "general vicinity" was left undefined in the second definition and has, likewise, been undefined in all subsequent definitions including the current one.

The number of employees of the Respondent during the two seasons involved exceeded seven (the limitation in the definitions); the establishment of the Respondent was located in a small town of some 650 population; the services were admittedly in the operations excepted; and, therefore, the only points involved in this litigation are whether the limitation as to the number of employees in the establishment is valid and whether the commodities were obtained from the territory described in the regulations—that is, the validity of the limitations "immediate locality" and "general vicinity."

At the trial of the issue as to whether the employees were excepted under Section 13(a)(10), the employer produced evidence showing the distance of hauls of commodities upon which the employees worked during the two seasons involved (Exhibits F, G, H—R. 179-184—admission in evidence 116-117), and the employees offered no testimony on this issue. The trial court reached the opinion that the limitation as to the number of employees was valid in each of the definitions and, since the Respondent had more than the limit, the Respondent could never be within the area of production regardless of where it obtained its commodities and, therefore, made no findings as to the territory from which the Respondent obtained its commodities, other than to find that the testimony as to the distance of the hauls was based on a direct distance "as the crow flies" and not by the shortest road haul (R. 193). The Circuit Court of Appeals adopted the haul distances shown by the Respondent in its opinion (R. 226-228).

The Petitioners contended that the definitions must be construed to mean that *all* of the commodities must be obtained within ten miles of the establishment, which theory was followed by the trial court, although it failed entirely to recognize that the ten mile haul limitation affected a period of only 36 days—April 20, 1939, to May 26, 1939, but the Circuit Court of Appeals construed the regulation to mean that only *substantially all* of the commodities must be obtained within that territory (R. 227).

So far, in this statement of the case, we have covered only that part of the case having to do with the exception provided under Section 13(a)(10) and this was the only portion of the case considered by the Circuit Court of Appeals in its opinion.

As stated above, the Respondent plead sections 7(b)(3) and 7(c) of the Act and, likewise, contended that the Act must be applied by the workweek and, in order to clearly present this last point, offered two additional

defenses: the first one denying that the appellant was subject to the Act during each and every of the workweeks involved and the second additional defense contending that the Respondent was within the exception provided by Section 13(a)(10) during each and every of the respective workweeks because it was within the area of production in the respective workweeks (R. 23-27). The trial court permitted the filing of the additional defenses but immediately sustained a motion to strike the same (R. 209).

B. Exemption Under Section 7(c).

In the Appendix to this brief (pages 81-82) will be found a complete copy of Section 7 of the Act. Section 7(c) provides for what is generally termed as the total 14 workweeks exemption—that is, an exemption for not to exceed 14 workweeks in any calendar year from the maximum hours provisions of the Act to the employees where an employer is engaged in canning perishable or seasonal fresh fruits and vegetables.

It should be borne in mind that the part of Section 7(c) "or in the first processing, within the area of production (as defined by the Administrator)" is not involved in this defense. Respondent claims the 14 workweeks exemption by reason of its operations in canning of seasonal or fresh fruits and not by reason of first processing. Therefore, the definition of area of production by the Administrator has nothing whatsoever to do with this claimed exemption and the definitions are involved in this case only in connection with Section 13(a)(10).

No testimony was taken on this issue which was set up in the fourth defense (R. 12) and stricken by the Court in his order of January 6, 1943 (R. 198), without granting leave to amend. The reasons for striking the same appear in paragraph F of said order (R. 200). The Circuit Court of Appeals did not pass on this point because it ruled that the Respondent's operations were not

under the Wage and Hour Act. Should this Court reverse the Circuit Court of Appeals and hold the operations were subject to the Act, this issue will then become important and this Honorable Court might, under its former decisions, refer the case back to the Circuit Court of Appeals to pass on this issue or, according to some of its decisions, might decide the point. Respondent was not in position to petition for certiorari on this issue in the case because the Circuit Court of Appeals did not pass upon it.

C. Exemption Under Section 7(b)(3).

This provision will be found in the Appendix to this brief (page 82). It grants a partial exemption from the overtime provisions of the Act not to exceed 12 hours a day or 56 hours a week for a period or periods not more than 14 workweeks in any calendar year in an industry found by the Administrator to be of a seasonal nature. The Administrator made a determination that the canning of citrus fruits was of a seasonal nature but this determination was not made until August, 1940, a date subsequent to the seasons involved in this case. The Respondent contended that if the operations during the two seasons were subject to the Wage and Hour Act, it was entitled to the benefit of Section 7(b)(3) (R. 10) but the Court struck this defense (R. 198-201) solely on the ground that the exemption did not exist until the Administrator had made his findings (R. 199).

What we have said under "Exemption Under Section 7(c)" with reference to a determination of that issue, is likewise applicable in all respects to the claimed exemption under Section 7(b)(3).

III. ARGUMENT.

SUMMARY.

Respondent, after explaining in a preliminary statement certain phrases and expressions to be used hereinafter, will develop its argument in the following manner:

1. Exception Under Section 13(a)(10).

This point is the main issue in this case and it shall be discussed as follows: (a) facts—a concise statement of the facts on this issue will be set forth; (b) the intent of the Congress will be shown from the provisions of the Act including the preamble and from the legislative intent; (c) the authority and the extent of the power of the Administrator will be discussed; (d) the applicable definitions and the amendment will be set out in a table and the same will be generally discussed; (e) the extent of the review of these definitions by this Court will be summarized, citing some of the former decisions of this Court and the Circuit Courts of Appeals announcing the applicable principles; (e-1) it will be shown that the definitions are so vague and indefinite as to deprive the Respondent of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States; (f) all of the cases which have dealt with this exemption will be clarified as to the conclusions reached; (g) the findings of the District Court in this case will be discussed and it will be shown wherein said findings and conclusions of law are clearly erroneous; (h) a few points in Petitioners' brief will be discussed; and (i) will be a discussion of the proper elements to be considered by the Administrator of the Wage and Hour Act in defining area of production.

2. Partial Exemptions Under Sections 7(c) and 7(b)(3).

Under this heading these partial exemptions will be discussed showing how the same are involved in this litigation and setting forth the contentions of the Respondent.

PRELIMINARY STATEMENT.

For convenience, throughout this brief, certain phrases and expressions will be used as follows:

"Number of employees limitation" meaning the provisions in the definitions limiting the number of employees in the establishment of the employer (App. 75-78).

"Immediate locality"—the phrase used by the Administrator in his first definition, the amendment, and the alternative portion of his second definition of area of production (App. 75, 77).

"General vicinity"—the expression so used by the Administrator in his second definition and as now used in the current definition (App. 76,77).

"Population criterion"—the provision in the amendment and in one of the alternatives of the second definition that the establishment must be located in a city or town of 2,500 or less population (App. 75-77).

"Haul limitation"—the provision in the amendment and in one alternative in the second definition that the commodity must be obtained from a distance of not more than ten miles from the establishment (App. 76-77).

"First definition"—The Administrator's definition effecting the operations from November 14, 1938, to April 19, 1939 (App. 75).

"The amendment"—the amendment which effected the operations from April 20, 1939, to May 26, 1939 (App. 75-76).

"Second definition"—the definition of the Administrator (of October 20, 1938) effecting the entire second

season and which contained two alternatives; that is, either "general vicinity" or the population criterion and the haul limitation (App. 75-77).

"Total exempt weeks"—the exemption under Section 7(c) permitting overtime for a period not to exceed 14 weeks without payment of overtime wages (App. 82).

"Partial exempt weeks"—provision under Section 7(b)(3) permitting overtime not to exceed 12 hours per day or 56 hours per week in a period or periods not to exceed 14 workweeks without payment of overtime wages (App. 81-82).

"The Act"—Fair Labor Standards Act of 1938 (29 U. S. C. A. 200 *et seq.*).

1. Exception Under Section 13(a)(10).

(a) Facts As to "Area of Production."

The prime question for determination in this case is whether the operations of the Petitioners during the two seasons involved were within the exception provided for under Section 13(a)(10). In other words, whether these operations were within the applicable definitions of area of production and, therefore, not covered by the Act.

Petitioners rely to a large extent upon the findings of the lower court for the facts on this issue. Respondent urges that these findings cannot be solely relied upon because the Circuit Court of Appeals, either explicitly or impliedly, overruled and reversed these findings as far as they pertain to Section 13(a)(10). We shall point out that many of the findings of the lower court were contradictory to the *admitted* facts in the case.

The Respondent, in its Fifth Defense, claims exemption from the Act under Section 13(a)(10) of the Act. All the facts alleged in paragraph 3 of the Fifth Defense as amended, and a portion of paragraph 8 of said defense as amended, were *admitted* by the petitioners to be true and were considered as *facts* in the case to the same extent as if otherwise proven (R. 144).

The *admitted* facts with reference to area of production are:

There are 39 citrus producing counties in Florida, commonly referred to as peninsula Florida. During the period mentioned in the complaint, approximately 48 million boxes of citrus fruit were produced annually in Florida's 39 citrus producing counties for shipment in commerce, being approximately 50% of all the citrus produced in the United States of which total 36.3% was produced in Polk County, Florida, where Respondent's plant is located, this being approximately three times as much citrus as is produced in any other County in Florida, the next largest production being in Orange County, approximately 35 miles from Respondent's plant. The establishment of Respondent is located at or near the exact geographical center of the production of citrus in the largest citrus producing state in the United States, nearly all of said citrus producing counties being contiguous and forming a well recognized area of production, as it has uniformly and customarily been recognized for many years, and as it has been defined by statute and regulation in the administration of many state and Federal laws prior to the adoption of the Fair Labor Standards Act of 1938, all of which have been heretofore undertaken to be administered uniformly throughout said area, where the production, handling, and canning of citrus fruit have simultaneously developed under uniform conditions of competition and gulation as to labor conditions as well as otherwise, and where no logical lines of classification can be drawn bearing a reasonable relationship to the objectives of the Act. The result of this integrated development of citrus is that the range of farm travel is great, many producers owning grove properties more than 100 miles distant, but belonging to a cooperative or customarily dealing with a single independent handler in proximity to one of such grove properties, and producers and handlers alike are competitors and neighbors, meeting in com-

mon markets and under common conditions to bid against one another for a single labor supply or a single price or to exchange solutions of their common problems through their groves or their establishments may be more than 100 miles apart; that there is produced within a radius of ten miles of Respondent's plant, approximately one million boxes of citrus fruit each year, being much more citrus fruit than the total quantity annually obtained by the Respondent for use in its establishment (R. 13, 14, 144).

The facts on this issue other than admitted in this stipulation are:

That the respondent-employer is a cooperative, organized and existing under the laws of the State of Florida (R. 92, 224), a copy of its charter and by-laws being filed as Exhibits A and B (R. 150-174—admitted R. 93).

The Respondent is engaged in packing and canning of fresh citrus fruits and it was stipulated that during the two seasons involved in this litigation, it operated its plant during the following periods:

1938-39 Season.

From November 14, 1938, to December 31, 1938—7 workweeks.

From January 1st, 1939, to May 26, 1939—21 workweeks.

(R. 146-147; through error 21 workweeks shown as 31 workweeks in the record.)

1939-40 Season.

From November 16, 1939, to December 31, 1939—6 workweeks.

From January 1, 1940, to March 30, 1940—30 workweeks.

(R. 147.)

Respondent's establishment is located in the small town of Davenport which has a population of some 650 people and which is located *in the very heart of the citrus producing area of Florida*, the town itself, at one time, having been all a grove, some of which grove has been neglected and abandoned but there are still some 50 to 60 acres of grove within the town limits (R. 125). Fruit is grown commercially all around the establishment of the Respondent (R. 126).

The charter of the respondent limits the stockholders to owners of bearing citrus groves located within the two townships surrounding Respondent's establishment. These groves are blocked out and thus indicated on the map filed as Exhibit D (R. 176—admitted R. 97); the furthest of these groves being about five and one-half miles from Davenport (R. 96). There are numerous other groves, not under the management of Respondent, within the same territory (R. 176) and a large volume of Respondent's products came from these groves (R. 124). By far, most of the fruit handled by Respondent came from the groves owned by its stockholders (First season 81%, second season 70%, Exhibit F, R. 180—admission R. 116). The Fair Labor Standards Act went into effect on October 24, 1938, and the Respondent began its operations on November 14, 1938. During this first season, in excess of 97% of all the fruit in the cannery came from groves located within ten miles of the establishment (R. 180, 226).

On June 19, 1939, the Hon. Alexander Akerman entered a temporary restraining order enjoining and restraining enforcement of Sections 6 and 7 of the Wage and Hour Act as to employees of certain packers and canners of the citrus industry of Florida, in the case of *Lake Wales Citrus Growers Association* v. *Elmer F. Andrews et al.*, in the District Court for the Southern District of Florida. This Respondent, along with practically all packers and canners of citrus fruit in Florida, intervened

in said cause and the said restraining order was extended to cover the employees of the Respondent and, thereafter, a preliminary injunction was issued in said cause on July 11, 1939, which remained in full force and effect until the mandate of the Circuit Court of Appeals was issued on August 10, 1940.

The Respondent operated under the protection of the Federal Court injunction during the season 1939-1940 (Second season involved), and, during that season, obtained 91.3% from groves within a radius of ten miles (R. 180, 227). Exhibit I (R. 185—admitted R. 127) is a Florida map and using Davenport as a center, circles have been drawn on the map with radii of ten, fifteen, twenty, twenty-five and forty miles. This map shows that there is located within ten miles of Davenport a city of over 2,500 population, to-wit: Haines City, and, because of this fact, the lower court held the Respondent's plant was not within the definition of area of production (R. 187-196). Exhibits G and H (R. 181-184, admission 117) show a breakdown for each of the two seasons for fruit that was not obtained from member groves; that is from the member groves located within 5 miles of the plant. These statements are fully explained by the witness in his testimony beginning on R. 119.

(b) Legislative Intent.

Unless the contrary appears, words of a statute are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. *DeGanay* v. *Lederer*, 250 U. S. 376, 63 L. Ed. 1042; *U. S.* v. *First National Bank*, 234 U. S. 245, 58 L. Ed. 1298; *Billings* v. *U. S.*, 232 U. S. 261, 58 L. Ed. 596.

The popular or received import of words furnishes the general rule for the interpretation of public laws. *Woolford Realty* v. *Rose*, 286 U. S. 319, 76 L. Ed. 1128; *U. S.* v. *Goldenberg*, 168 U. S. 95, 42 L. Ed. 594. However; this Court has likewise announced that the words might

not be given their ordinary grammatical construction if the sense be repelled by the intention or if they lead to absurd consequences. *Marks* v. *U. S.*, 161 U. S. 297, 40 L. Ed. 706; *Ozawa* v. *U. S.*, 260 U. S. 178, 67 L. Ed. 199.

While Respondent contends that the words and expressions used in Section 13(a)(10) are clear, unambiguous and give to the Administrator a guide or framework for his regulations or definitions, a mere study of the balance of the Act clearly sustains such contentions.

The preamble, coupled with the provisions of the Act, clearly points to two prime purposes in the minds of Congress. One, to eliminate substandard living conditions brought about by low pay in industry, and, two, not to interfere with the farmers and certainly to put no additional burdens on him. The Act was aimed at "sweat shops" and was passed under the commerce clause.

Between industry and farming lie the operations involved in this litigation. Did Congress ever intend this Act to apply to an industry so closely allied to agriculture that the farmer would have a further burden or expenses in connection with marketing his crop?

Having placed in the Act provisions to cure the evils referred to in the preamble, Congress then proceeded to set forth the exemptions in Section 13. Under paragraph (a) of the Section, Congress provided ten exemptions and a mere reading of each of these exemptions will show that the same were prompted by reason of the fact that the services referred to in each exemption were not strictly industrial. Petitioners contended below that the operations of this Respondent could not be exempt because their employees were not employed in agriculture, or the broader view—that the employer was not a farmer. If Congress had intended that only farmers or persons employed in agriculture were to be exempt, there would have been no reasons whatsoever for the exemptions set forth under Section 13(a). Having exempted the farmers, as well as the employees in agriculture, Congress then

went a step further and said that any individual engaged in certain handling of agricultural or horticultural commodities would be exempt if employed within the area of production (as defined by the Administrator).

Petitioners contend that Congress did not intend the dictionary meaning of the words "area of production." Nowhere in the preamble, or in any other provisions of the Act, do we find any indication whatsoever that the ordinary grammatical construction of this phrase is repelled by the intention of Congress.

Clearly, Congress intended that industry should be covered by the Act, that agriculture should not be covered and that packing and canning of agricultural commodities would not be covered if the operations were performed in the area where the commodity was produced. It left to the Administrator the problem of determining the area of production of the commodities—it did not leave to the Administrator the right to grant or take away the exception.

When the bill S 2475 reached the House from the Senate it was referred to the Committee on Labor and we find that it was not to apply to a "person employed in agriculture." This expression was contained in the definitions in the bill and the Committee (Report 1452) had this to say about it,

> "The term 'person employed in agriculture' as used in the bill, insofar as it refers to fresh fruits or vegetables, includes persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state."

In the Report of the Committee on Labor, No. 2182, made to the 75th Congress, Third Session, we find,

> " 'Employee employed in agriculture' is defined to include individuals employed within the area of production engaged in storing for the farmer, pre-

paring (but not commercial processing), or packing agricultural, or horticultural commodities in their raw, natural, or dried state. It does not include employees of transportation contractors engaged in transportation of farm products from farm to market. The definitions of 'agriculture' and 'employee employed in agriculture' are important in connection with the exclusion of employees in agriculture from all the provisions of the committee amendment."

Report 2738, being a conference report, includes Section 13(a) substantially as it is found in the Act. This arose by reason of an amendment proposed by Senator Schwellenback which read:

"The term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing or storing such fresh fruits or vegetables in their raw or natural state" (C. R. July 30, 1937, p. 10179)."

Following this proposal, a discussion took place on the Senate floor in which the following was said:

"Mr. Connally: The effect of the amendment is to exempt all employees of apple-packing plants; is it not?

Mr. Schwellenbach: If they are engaged in the area of production and so long as apples are in their natural or raw state; yes, sir.

Mr. Connally: Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territories? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. Schwellenbach: If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

Mr. Connally: My understanding is that the largest apple packing plant in the world is located at Winchester, Virginia, right in the heart of a great apple-producing region. That would be exempt, would it not?

Mr. Schwellenbach: If the work done in that plant is described in the amendment, it would be exempt."

(C. R. July 30, 1937, pp. 10179, 10189, 10181.)

As was said by Judge Deaver in the *Peanut case, supra*, 37 Fed. Supp., Text 634,

> "The intention of Congress is clear and unequivocal to exempt from the Act those employed in performing services described in Section 13(a)(10) upon agricultural or horticultural commodities where the place of employment is within the area in which the commodities are produced."

The principal element in the definitions is the number of employees limitation. Neither the history of the legislation, the preamble nor any subsequent provisions of the Act give any justification for defining area of production according to the number of employees in the establishment.

If Congress specifically refuses an idea or proposition, it then clearly shows the intent of that legislative body with reference to such proposition. The number of employees limitation idea was *twice rejected* by Congress when the same was offered as amendments to this bill. In C. R. July 27, 1937, page 9910, we find that Senator Reynolds suggested an amendment exempting employers of ten or less employees and on July 30, 1937 (C. R. Page 10166), the senator offered an amendment providing an exemption of employers employing ten or fewer than ten persons, but, on the same date, *this amendment was rejected* (C. R. page 10191). The next day, he offered another amendment which exempted from the provisions of the Act employers of five or fewer than five persons and *this amendment was likewise rejected* (C. R. July 31,

1937, page 10266). In other words, this very identical concept was turned down by Congress. How, then, can it be logically contended that Congress intended that the number of employees in a plant should be a controlling basis for determining whether the same was within the area of production?

Subsequent to the rejection of these proposed amendments, the Senate passed the bill on July 31, 1937, with Mr. Schwellenbach's amendment with reference to area of production. The intent of Congress is just as clear from these actions as if it had said in the bill, "the number of employees of an employer shall not be a determining factor as to whether the employer is covered by the Act."

Fleming v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52, involved a contention that the manufacturing of shells into buttons was exempt under Section 13(a)(5) which affords an exemption to employees engaged in certain operations in connection with fish or other aquatic forms of animal and vegetable life.

The Court say (Text 56):

> "We are of the view that the manifest purpose of the exemption was to except from the Act such activities or operations connected with the maritime pursuits described, as were controlled or materially influenced by natural factors or elements."

An amendment was offered to the Act to exempt employees engaged in the manufacturing of fishery products but was rejected and that Court recognized that this action showed the clear intention of Congress by saying (Text 58):

> "The refusal of Congress to thus broaden the Act to include the manufacture of fishery products clearly shows its intention to omit the manufacture of such products."

The action of the legislative body in rejecting the amendment should be weighed with all other circumstances. *Carey* v. *Donohue*, 240 U. S. 430, 36 S. Ct. 386, 60 L. Ed. 726. *Fox* v. *Standard Oil Company*, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780.

It is also clear from a study of the legislative history, as well as the Act itself, that Congress intended that the area of production should mean a geographical area. As to this, there seems to be no dispute. Therefore, using this test, does the number of employees factor injected into a definition bear any reasonable relation to the geographical area of production of a particular agricultural commodity? For instance, did Congress intend that an employee performing the excepted services on citrus in the very heart of the citrus producing area of Florida be not exempt because he has 10 co-employees, while another employee having only 9 co-employees in an establishment on the outer fringe of the area of production be exempt? The answer is that Congress intended that both employees be exempt so long as their services were performed within the area where the commodity was produced.

As we have shown, Congress intended that the services by a farmer or on a farm as an incident to its farming operations be exempt. This is clearly covered by the agricultural exemptions but the Congress intended that there be a further exemption to apply to persons performing certain specified services on agricultural commodities after these commodities left the farm, but while they were still within the area of production There was no desire or intent to exempt said services if they were performed in an industrial area as distinguished from the production area. In other words, if citrus grown in the agricultural areas of Florida should be carried in its raw state to the eastern industrial areas and there processed, such services in processing the commodity were not to be exempt. This intent was shown when the Congress said the services must be performed within the area of production. By

his definitions, the Administrator has limited the exemption so as to cover practically the same operations as the agricultural exemption. No packer or canner of citrus could ever come under the exemption of Section 13(a)(10) because they all use in excess of ten employees, although they, like the Respondent in this case, have their plants in the very heart of the citrus producing area—are within the actual area of production. Petitioners nowhere question the fact that Respondent's plant is so located. In other words, Petitioners admit, and of necessity must admit, that Respondent's plant is in the very heart of the citrus producing area, therefore, the area of production, but they say that the Respondent cannot claim the exemption because the Administrator has said that the Respondent employs too much help.

(c) Authority and Power of Administrator.

Determining the meaning of area of production involves the scope of the power of the Administrator as well as the validity of his attempted execution of that power.

It is elementary that the legislative power cannot be delegated but the power to determine facts and thereby fix the operation of the legislative act, otherwise complete in itself, may be delegated to an administrative officer. Undoubtedly, the power conferred by this Act is not one to make rules and regulations so as to fix or delimit an area of production, but is a power to determine the geographical location of the area as it actually exists. This necessarily implies that the area of production shall be ascertained and its boundary so defined with sufficient accuracy to permit a decision on the question.

In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624, this Court say:

> "The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from re-

sorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command."

The congressional policy announced by the Act was to exclude from the operation *all* employees engaged in prescribed operations on agricultural products "within the area of production." The power of the Administrator was to examine all pertinent facts and ascertain the limits of the several areas of production of each commodity covered by the exception. Congress did not delegate to him the power to determine policies or to enlarge or restrict the operative force of the language employed by Congress, or to promulgate rules, the application of which will create artificial areas, or which will otherwise limit them without regard to the facts which should properly control the finding in each case.

The Congress recognized that the actual area of production of a commodity already exists and neither the Congress and, certainly, not the Administrator, can change this actual area. The Administrator was not instructed to create an artificial area of production but to find and determine the existing area of production of a commodity. According to some of his definitions, no area of production exists if the establishment employs more than 7 workmen; no area of production exists for a commodity other than in a prescribed circle with a diameter of 20 miles, no area of production exists for a commodity within ten miles of a town of 2,500 or more population, if the employer has his packing or processing plant within that town. Probably, Congress might have created an artificial area of production for the purposes of the Act but nowhere is there any indication that it was the intention of the Congress so to do. It is far beyond the scope of the Administrator's power to attempt to do so. The Act does

not say that the exemption is to apply to the enumerated services within the area of production (as designated by the Administrator). The act says, "as determined by the Administrator." Determine means to find or ascertain. It does not mean to create, delimit, restrict, or designate as he has attempted to do.

The words "area of production" must be construed as laying down a guide or standard to govern the reasonable exercise of discretion by the Administrator, or the statute itself will violate constitutional limitations upon the delegation of legislative power. 11 Am. Jur. 947. It must be construed so as to prohibit the Administrator from arbitrarily extending or limiting the expressed will of Congress, and it follows that, if Congress cannot delegate this power, its assumption by the Administrator must be construed as illegal and void.

"To define" when spoken of space, means to set or establish its boundaries authoritatively. *Robert J. Boyd Paving & Contracting Co. v. Ward*, 85 Fed. 27.

"Define. (3) To determine with precision or clearly exhibit the boundaries of; to mark the limits of; as to *define* the extent of a kingdom or country." Webster's New International Dictionary.

It seems quite clear, then, that the power of, and the direction to, the Administrator is to examine the territory where the products are grown or produced, and to find out the boundaries of the area of such production. If he finds that the labor in question is performed within that area, the exception made by Congress applies.

The Circuit Court of Appeals in the *Peanut case, supra*, say:

> "The word area means a surface, a territory, a region; in this case the territory or region where farm and orchard products are raised."

As Judge Waller, in his concurring opinion in this case (R. 229) says:

> "The real question is whether the actual area of production is to be disregarded and the definition of the Administrator is to control rather than the intent of Congress not to handicap the farmer in the marketing of his produce * * * to put it differently, can the Administrator be said to have defined the area of production of certain commodities when in truth and in fact he has *not* defined such area of production?"

This case certainly presents this clear cut issue. The parties litigant, the attorneys and the courts all know that this Respondent's establishment is located in the area of production of citrus fruit. It is an established fact. Does the Administrator have any power to say this fact, known to all, is not a fact? No person could stand at Respondent's plant surrounded by groves bearing citrus fruit and say that he does not stand in the area of production of citrus fruit. However, following the Administrator's concept, the minute 10 other people walk up beside the person standing at the plant, he is no longer in the area of production. Does the fact that ten other people came to the same place change the location of the plant? To ask the question is, of course, to answer it.

To follow the District Court's reasoning, a man standing in the midst of the groves could not be in the area of production if there happened to be a town of 2,500 or more population anywhere within ten miles of him.

Judge Deaver in the *Farmers Peanut case, supra* (37 Fed. Supp., Text 632), had this to say:

> "No authority is delegated to the Administrator to make any definition, or to prescribe any limitation upon the operation of the exemption afforded by Section 13(a)(10) of the Act, except to define 'area of production.' "

Lukens Steel Company v. *Perkins*, 107 F. 2d 627, is a recent case familiar to this Court because the order of the United States Circuit Court of Appeals for the District of Columbia, in that case, was up for review before this

Court; the decision being reported in 310 U. S. 116, 84 L. Ed. 1108. This Court held that plaintiffs in the case below did not have such standing as to entitle them to the injunction but had nothing whatever to say about the rulings of the Court of Appeals on the merits. The Court will recall that this case involved the action of the Secretary of Labor under the Public Contracts Act. This Act in substance provides that the government could not enter into a contract for materials or supplies in an amount exceeding $10,000 unless the contractor had paid not less than the minimum wages determined by the Secretary of Labor to be the prevailing minimum wages for similar work in the *locality* in which the materials were manufactured. She determined that the locality for furnishing products of iron and steel included 13 states, a portion of a 14th, and the District of Columbia. The determination was attacked and the Court of Appeals delivered a very exhaustive opinion and reached the conclusion that the action of the Secretary of Labor was beyond her power and void. The opinion expresses many fundamental principles of law, citing ample authority therefor and then, after applying these principles to the questions at hand, says:

> "To permit the Secretary to establish a minimum wage scale for the area embraced within fourteen states and the District of Columbia would be to defeat rather than to accomplish the purpose of the Act" (Text 634).

This same thought is just as applicable to the case at bar. May we paraphrase it thus, "to permit the Administrator to delimit the area of production of a commodity in conflict with its actual area would be to defeat rather than to accomplish the purpose of the Act."

This Court has also said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, involved the action of the Postmaster General in refusing to deliver certain mail. After pointing out that the facts did not authorize the action of the Postmaster General, and that the Courts must have power to grant relief, the Court stated:

> "Otherwise, the individual is left to the absolutely controlled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the persons whose letters are withheld."

Under the Railway Land Grant Act of July 27, 1866, the Secretary of Interior insisted upon a demand that a railroad grantee make an advance deposit to cover estimated cost of surveying. In *Santa Fe Pacific Railroad Company* v. *Frank K. Lane*, 244 U. S. 492, 61 L. Ed. 1275, this Court held that the Secretary of Interior in making such a demand had plainly exceeded his authority.

A large number of the District Courts, as well as the Circuit Court of Appeals of the Fifth Circuit, took occasion in their opinions to point out that the Administrator had far exceeded his authority in promulgating the involved definitions.

The power and authority of the Administrator was limited to an ascertainment of the actual area where the commodity is produced and when he attempted to change this area, he went far beyond his authority and not only formulated a definition which is unconstitutional and, therefore, void, but also in conflict with the expressed words of the Act itself, in conflict with the intention of the Congress and beyond the scope of his authority.

(d) Definitions of the Administrator Involved in This Litigation.

During the two seasons involved in this case, there were two definitions and an amendment and the follow-

ing table shows the definitions and the amendment involved, the operating times and the facts with reference to obtaining the raw products during those periods of time. The portions of the definitions held to be void by the Circuit Court of Appeals are in bold type.

Definition	Time Involved	Haul Less Than 10 mi.	25 mi.	Unknown
	SEASON 1938-1939			
	First Definition			
individual shall be re- ed as employed in the a of production" within meaning of Section 13 0) in • • • canning of cultural or horticul- commodities for ket • • • if the agri- ural or horticultural modities are obtained he establishment where s employed from farms the immediate locality **the number of em-** **ees in such establish-** **t does not exceed seven** p. 75).	Nov. 14, 1938 to Apr. 19, 1939	97.24%	1.80%	96/100%
	Amendment			
with respect to perish- or seasonal fresh fruits vegetables, if he is en- d in canning such prod- for market in an es- ishment which is located he open country or in a l community and which ins all of its products n farms in its immediate lity. As used in this section (e) "open coun- or "rural community" l not include any city own of 2500 or greater ulation according to the United States Census , and "immediate lo- y" shall not include any ance of more than ten s (App. 75-76).	Apr. 20, 1939 to May 26, 1939	97.24%	1.80%	96/100%

SEASON 1939-1940

Second Definition

An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a)(10) in * * * canning of agricultural or horticultural commodities for market * * * (a) if he performs these operations on materials all of which come from farms in the general vicinity of the establishment where he is employed **and the number of employees engaged in those operations in that establishment does not exceed seven** or (d) if he performs those operations on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d) "immediate locality" shall not include any distance of more than ten miles and "open country" or "rural community" shall not include any city or town of twenty-five hundred or greater population according to the 15th United States Census, 1930. (App. 76-77).	Nov. 16, 1939		
	to	91.39%	4.%
	March 30, 1940		

It will be noted that the number of employees limitation applies to the first definition and to one of the alternatives in the second definition as well as to a current definition (App. 75-78).

The number of employees of the Respondent exceeded the limitation, and, likewise, exceeds the limitation in the present definition and, therefore, should this Honorable Court hold this element of the definitions valid, it would necessarily mean that from November 14, 1938, to April 19, 1939, during the period of the first definition, this Respondent was not within the area of production as defined by the Administrator and, therefore, not entitled to the exemption during that period of time.

Such a holding would mean that, during the entire second season, this Respondent was likewise outside the area of production unless it was within the alternative definition during the second season.

A specific ruling on the population criterion is unnecessary because this Respondent's establishment was located within a town of some 650 population.

The ten mile haul limitation was in the amendment and involves a period of some 30 or 40 days of the first season. In determining this point, the Court will, undoubtedly, consider whether *all* of the fruit must be obtained within the ten mile limit or *substantially all;* the trial judge said *all* and the Circuit Court of Appeals said *substantially all.*

For approximately five months in the beginning of the first season, the first definition applied containing "immediate locality" and number of employees limitation. "Immediate locality" might have a different meaning when applied to different sets of facts.

In the amendment of April 20, 1939 (App. 75), the Administrator said that "immediate locality" meant obtaining the commodities within a radius of ten miles. However, under the decision of *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue,* 297 U. S. 129, 80 L. Ed. 528, the amendment was not retroactive and, therfore, "immediate locality" the first definition did not necessarily mean within a radius of ten miles.

During the second season, there were in force and effect alternative definitions, one being "general vicinity" with the number of employees limitation and the other being a requirement that the establishment be located in a town of 2,500 or less and obtain its commodities within a distance of ten miles. The first of these alternatives is a definition similar to the one now in force and effect except that the employee number limitation has been changed from 7 to 10 (App. 77). Therefore, a ruling by

this Court upon that alternative would settle the validity or invalidity of the current definition.

The elements of the definitions involved in the case are:

1. The expression "immediate locality";
2. The expression "general vicinity";
3. The haul limitation; and
4. The number of employees limitation.

The actual area of production of an agricultural commodity might conceivably change over a period of years due to natural causes but, assuredly, the actual area of production since October, 1938, has not undergone the numerous and radical changes indicated by the several definitions of area of production during that period of time. The fact that the Administrator has seen fit to make these different definitions or amendments is positive evidence of the recognition on his part that the former definitions were invalid. If this not be true, why did he change them? If the definition providing that the commodities must be obtained from the "immediate locality" and that the number of employees be limited to seven was a valid defining of area of production on October 20, 1938, why was it changed? If the population criterion and the haul limitation were necessary and proper elements in defining the area of production in 1939 why are they not proper elements now, although these factors were abandoned in later definitions and do not appear in the current definition?

It has been consistently argued that it was impractical to formulate definitions applicable to one commodity or a group of commodities yet as early as June, 1939, the Administrator promulgated a separate definition for dry edible beans and another definition for Puerto Rican leaf tobacco (App. 78-79). If those two commodities could be withdrawn from the general definitions why could he not withdraw other commodities to which his general definition was unreasonable and capricious?

(e) Principles Applicable to Determination of Validity of Definitions.

A case to which we particularly call the Court's attention is *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160, involving the Bituminous Coal Conservation Act. One point considered by the Court was whether the exaction of fifteen percentum on the sale price of coal in the mine is a tax or penalty and held that the same was a penalty, although carried in the Act as a tax. Mr. Justice Sutherland, speaking for the Court, said:

> "While the law maker is entirely free to ignore the ordinary meanings of words and make decisions of his own (citing cases) that device may not be employed so as to change the nature of the acts or things to which the words are applied."

Certainly, if Congress could not do that, an administrative agency could not. The Administrator cannot by any definition change the actual area of production.

Judge Waller, in his concurring opinion (R. 230) uses this example:

> "Congress can see a rabbit run across a state line and declare it was a lion, and a lion it is, but can the Administrator do that? My thought is that the Administrator must define 'area of production' in fact and without regard to the number of employees, without regard to the location of a city, and without regard to any factor, other than the area within which such fruits and vegetables are customarily and in the usual course of business, brought by the farmer to be marketed or processed."

The *Carter Coal Company case, supra*, likewise dealt with a problem that often times arises when a portion of a statute is found to be invalid and reached the conclusion that Congress by the Act intended to regulate labor and prices and if one portion of the Act was stricken, the other would likewise follow as being an essential part thereof.

In our case, we have three different definitions involved with the number of employees limitation common to the first definition (immediate locality) and to one of the alternatives in the second definition (general vicinity). The population criterion and the haul limitation is common to the amendment and to one of the alternatives in the second definition. Therefore, this Court will consider the validity or invalidity of the several elements and if any of said elements are found to be proper, decision must be reached as to whether the entire definitions will be held void or whether approved with the invalid element or elements deleted.

It is contended by Respondent that if the number of employees limitation is held to be invalid, the balance of the definitions in which such limitation appears would not thereby be void. However, we do respectfully submit that the limitations "immediate locality" and "general vicinity" are likewise invalid and, therefore, the entire definition is void.

With respect to the amendment, which is the same as one of the alternatives in the second definition, it would seem that the elements there are so interlocked that a deleting of one of the elements would necessarily invalidate the entire definition. In these definitions, the Administrator said that the establishment must be located in a town of 2,500 or less population and procure his commodities from not more than ten miles.

Another principle announced in the *Carter Coal case, supra*, is:

> "Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means and ends with the adoption of methods and details to carry the delegated powers into effect * * * For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers

> into effect are not restricted save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution." Text 291.

The same principle applies to a means adopted by an Administrative agency. Such means must be "consistent with the letter and spirit of the Constitution."

Due to the necessities that have arisen by many of the Acts of Congress, administrative bodies have become very essential instrumentalities in the carrying out of the intents and purposes of Congress. Many of the rules and regulations of such agencies or commissions have reached this Court for interpretation and, in connection with the consideration thereof, certain fundamental principles have been announced, with which this Court is thoroughly familiar. In substance, the Respondent understands that such regulations will be upheld by this Court if the same are within the scope of authority of the commission, if the requirements of due process are met and if the action is based upon substantial evidence and complies with the spirit and letter of the Constitution and is not arbitrary or unreasonable. *St. Joseph Stock Yard Company* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033; *Manhattan General Equipment Co.* v. *Commissioners of Internal Revenue*, 297 U. S. 129, 80 L. Ed. 528, where it is stated:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Citing numerous other cases (Text 134).

Miller v. *United States*, 294 U. S. 435, 79 L. Ed. 977; *Shields* v. *Utah-Idaho, Central R. R. Co.*, 305 U. S. 177,

83 L. Ed. 111; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 87 L. Ed. Advance Sheets 540; *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 68 L. Ed. 1034; *Gray* v. *Powell*, 314 U. S. 402, 86 L. Ed. 301.

The Circuit Courts of Appeals have also followed these principles. As an example see *Knight* v. *Mantel*, 135 F. 2d 514; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *U. S.* v. *Stanolind Crude Oil*, 113 F. 2d 194; *Utah Copper* v. *Railroad Retirement Board*, 129 F. 2d 358.

This Court has on several occasions considered findings and orders of the Interstate Commerce Commission and, although the above principles are generally applicable, this Court consistently relies on Section 16 of the Interstate Commerce Commission Act providing that the findings and order shall be *prima facie* evidence. Petitioners in their brief rely, to a large extent, on these Interstate Commerce Commission cases. Respondent does not urge any variation of these principles but contends that an application of them to the regulations of the Wage and Hour Administrator lead unerringly to the conclusion that these definitions are void for they violate the provisions of the Constitution, are beyond the scope of and in direct conflict with the Act itself, are contrary to the legislative intent and are capricious and unreasonable.

(e)(1) The Definitions Are in Conflict with Article V of the Amendments to the Constitution of the United States.

The first and second definitions are so vague, uncertain and indefinite as to deprive this Respondent of liberty or property without due process of law in violation of Article V of the Amendments to the Constitution. This is true because of the indefinite and ambiguous phrases "immediate locality" and "general vicinity."

It is not contended that this unconstitutionality applies to the amendment in force and effect from April 20, 1939, to June 17, 1939, covering about 5 weeks of the operating

time in the first season, because during that period, "immediate locality" was definitely defined as meaning a distance of ten miles or less and the amendment is being attacked on other grounds.

The Fair Labor Standards Act provides two heavy penalties under Section 16: *i. e.*, a fine of not more than $10,000 or imprisonment and payment of liquidated damages equal to any unpaid wages and unpaid overtime, together with court costs and attorneys' fees.

Congress realized that to leave the exceptions under Section 13(a)(10) as applying to employees within the "area of production" without some defining of said indefinite expression, would, undoubtedly, cause the statute to be unconstitutional and, therefore, instructed the Administrator to define "area of production," giving to him standards and framework sufficient for him to fill in the details.

Let us consider the plight of an employer engaged in the canning business in the heart of the citrus belt of Florida, such as Respondent. The Act went into effect on October 24, 1938, and the first action of the employer was to consider whether or not he was subject to the Act; whether he would be subject to the heavy penalties if he failed to comply. The Administrator had promulgated a definition of area of production which, in effect, said that the employer would have to obtain its commodities from farms in the immediate locality (App. 75). This definition remained in force and effect until April 20, 1939, which covered the first season involved in this case with the exception of the last few weeks. If he procured his commodities from the "immediate locality" he was not subject to the wages and hours provisions of the Act and the other provisions, such as Child Labor and record keeping, were of no particular concern—he was not violating the Child Labor provision and his records were already being kept in compliance with the requirements of the Act. To comply would mean additional expenses which would have

to be borne by the farmer; and, yet, it appeared very clearly that the Congress did not intend that. There was no assurance that his competitor would make the same guess as to what to do. If he was not obtaining his commodities from the "immediate locality," he must immediately comply with Sections 6 and 7 of the Act or be subject to the penalties provided in the Act. What would be the guide to a court or jury in ascertaining what constituted "immediate locality"? What might be regarded as "immediate locality" to one employer might not be so regarded to another. The dividing line between what was lawful and unlawful had been left to conjecture. As this court so aptly said in *Connally* v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322:

> "Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality."

An ordinary person could not intelligently choose in advance what course it was lawful for him to pursue, which is one of the tests laid down in the *Connally case, supra.*

From April 20, 1939, to May 26, 1939, the employer then had a definite statement of what the Administrator meant by "immediate locality"—ten miles if the plant was in a town of less than 2,500.

During the second season involved in this case, the employers found themselves still confused because of the use of the indefinite phrase "general vicinity." During the second season, there were alternative definitions, one of which was "general vicinity" with absolutely no means of ascertaining what the Administrator meant and the other was "immediate locality" defined by the Administrator to mean not more than ten miles.

Was it necessary that he obtain every grapefruit and every orange from a distance of ten miles or from the "general vicinity," whatever that meant, or if he obtained substantially all of his commodities from ten miles or less or from "general vicinity," was he insuring himself that he would not be subject to fine and imprisonment or to the payment of large liquidated damages? Was he subjecting himself to harsh penalties if he procured a small portion of his fruit beyond ten miles?

There are innumerable decisions of this court and others to the effect that a penal statute will be held invalid if it is so vague and indefinite that it does not lay down a yardstick by which a reasonable person knows whether he is violating the Act or complying with it.

One of the leading cases on this point is *Connally v. General Construction Co., supra,* which involved a state statute requiring the contractor under penalty to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed." This Court reached the conclusion that the statute was invalid because of vagueness and indefiniteness in two particulars—with reference to current rate of per diem wages and in using the expression "locality." The Court say:

> "* * * that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and the term 'locality,' itself, is fatally vague and uncertain * * * that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a Statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

That particular state statute had been construed by the highest court of that state, to-wit: Oklahoma in *State* v. *Tibbetts*, 205 Pac. 776, but this court with reference to that decision said:

> "But all that Court did there was to define the word 'locality' as meaning 'place,' 'near the place,' 'vicinity, or neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties."

In *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 70 L. Ed. 1059, this court for the same reasons struck down the Chinese Bookkeeping Act which required Chinese merchants, doing business in the Philippine Islands, to keep their accounts in the English or Spanish language or local dialect because the same deprived them of their liberty and property without due process of law.

The cases of *International Harvester Company of America* v. *Commonwealth of Kentucky*, 234 U. S. 216, 58 L. Ed. 1284, and *Collins* v. *Commonwealth of Kentucky*, 234 U. S. 634, 58 L. Ed. 1510, involved Kentucky statutes which the Court held invalid because they were vague and indefinite.

The Lever Act was involved in *United States* v. *Cohen Grocery*, 255 U. S. 81, 65 L. Ed. 516, and the particular portion of the statute under attack was:

> "That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

That these words did not fix an ascertainable standard of guilt clearly resulted from their mere statement, according to Mr. Chief Justice White, who wrote the opinion for the Court, holding the section repugnant to the Constitution and citing numerous authorities.

One of the state court decisions on this point is *State* v. *Lantz*, 111 S. E. 766 (W. Va.), where this language is found:

> "If this statute should be upheld, there would be no uniform rule of conduct governing the operation of an automobile upon curves in public roads. There would be as many different standards as there would be different opinions among the juries and judges trying the cases, as the same arise, and no man would ever know, until after he was tried and convicted or acquitted upon the charge brought against him whether he had been guilty of an offense or not."

This quotation is so applicable to the situation at bar and is borne out by the fact that there have been some 18 cases involving this particular portion of the Act, to-wit: Section 13(a)(10). No part of the Act has been so troublesome or has given rise to so much litigation as this section due to the numerous unsuccessful attempts of the Administrator to delimit the exemption and his failure to define it within the standards laid down by Congress.

The above cited cases, of course, involve statutes rather than regulations but, since a regulation has the force and effect of law, unless and until set aside by a court, the same general principles would apply; otherwise, we would have the situation where an administrative body could violate the Constitution of the United States while the legislative branch of the government would be limited by its provisions.

To say that this suit does not involve the penal provisions of the Act is merely to evade the question. The Respondent is confronted with a claim for not paying overtime wages, for an amount equal to the same in liquidated damages, for costs, and attorneys' fees. True, this Court has held that the payment of liquidated damages is not a penalty but, certainly, it is not thought that this Respondent is in the position of violating an Act as far as the employees are concerned and not subjecting itself to the heavy penalties.

An adjudication by this Court that the limitation of the number of employees provisions in the definitions are void and that the defining of the area of production by "general vicinity" is sufficient would still leave the packer and canner of agricultural commodities in the United States in a quandary as to whether he procures his commodities from the "general vicinity" of his plant and until courts or juries have passed upon each individual case no employer can know whether his actions are subjecting him to the heavy penalties of the statute.

(f) Court Decisions on Issues Involved in This Litigation.

Petitioners on pages 31 and 32 of their brief cite 21 cases decided by the lower courts (exclusive of the opinions in this case) which they allege deal with the Administrator's definitions. Petitioners omit the decision in *Janes* v. *Lake Wales Citrus Growers Association* by the District Court, which was entitled *Lakes Wales Citrus Growers Association* v. *Andrews*, and also omit from their list *Walling* v. *Yeakley*, District Court of Colorado, which when added to the list, will make a total of 23 cases. For convenience, we shall group these decisions as follows:

1. CASES WHERE THE DECISION WAS REACHED ON POINTS OTHER THAN THOSE INVOLVED IN THIS LITIGATION.

Redlands Foothills Groves v. *Jacobs*, 30 Fed. Supp. 995; Yankwich, Judge:

This was a case seeking a declaratory judgment as to whether the operations of certain employers were subject to the Act and for an injunction restraining the enforcement of the Act. The Court held that it did not have the necessary parties before it and, therefore, dismissed the bill. He made several comments about the definition of area of production indicating that if the validity of the same was properly before him he would hold the same valid.

Janes v. *Lake Wales*, 110 F. 2d 653 (C. C. A. Fifth), Sibley, Judge, and opinion by the District Court, same case:

The Court here merely held the lower court was without jurisdiction to enter the injunction because of lack of necessary parties.

Abram v. *San Joaquin Cotton Oil Company*, (S. D. Cal.) 46 Fed. Supp. 969, O'Conner, Judge:

The definition of area of production was not involved in this cause because the Court held the services of the employees did not fall within the described operations in Section 13(a)(10) and, therefore, ruled that they were not within the exception and had no occasion to nor did it consider any definitions of area of production.

Gaskin v. *Clell Coleman & Sons*, Mercer County, Kentucky:

Clearly this case has no place in any consideration by this Court of the issues in the case at bar. In a suit by employees, the employer contended it was exempt under Section 13(a)(10) but the Court held the exemption applied to commodities handled for market and not for milling purposes and, therefore, the operations did not fall within Section 13(a)(10).

Abram v. *San Joaquin Cotton Oil Company*, (S. D. Cal.) 46 Fed. Supp. 969:

This case did not in anywise involve the validity of any definitions. However, the Court did hold that the plaintiffs' services were rendered in the area of production.

Walling v. *The Peacock Co.*, Western District of Wisconsin:

Although the Court held that since the employer made customary purchases of the commodity from another state,

it could not be within the area of production, the case went off on the point that the services did not fall within those designated in the exemption.

The six above listed cases should be withdrawn from the list, leaving a total of seventeen, which we further classify:

2. CASES HOLDING THE LIMITATION AS TO NUMBER OF EMPLOYEES VOID.

Lake Wales Citrus Growers Association v. *Andrews et al.*, District Court, Florida:

As employers did in the *Redlands case, supra,* the packers and canners of citrus fruit in Florida, attempted to get an early adjudication of its rights and responsibilities under the Fair Labor Standards Act and instituted suit in the District Court for the Southern District of Florida entitled *Lake Wales Citrus Growers Association* v. *Elmer F. Andrews* which became, on appeal, *Janes* v. *Lake Wales, supra.* In that case, declaratory judgment was sought together with an order restraining the enforcement of the Act. The trial judge made extensive findings which were not ruled upon by the Circuit Court of Appeals because that Court held the Court without jurisdiction because of lack of necessary parties. Among other facts, the District Court found,

> "that citrus fruits are produced in commercial quantities in thirty-nine counties of the State of Florida, as stated in the amended complaint, said counties comprising a contiguous area which is co-extensive with the Peninsula area of Florida";

also found that the employers, including this Respondent, had its establishment within the 39 counties and said that,

> "each of said plaintiffs and of said intervenors has its packing or canning establishment or establishments located in an actual area of commercial production of

Florida fresh citrus fruit; that is, in an immediate locality where citrus fruits are grown and produced in commercial quantities."

The Court concluded, as a matter of law, that the definition of area of production was arbitrary, capricious, unreasonable, and discriminatory in violation of the Act and of the legislative intent and, therefore, void; that the Act does not authorize the Administrator in defining the term "area of production" to change the usual, logical, reasonable and generally accepted meaning of the words "area of production," that there is no legal basis for a distinction between two establishments, both of which are located within the actual area of production, when one of said plants obtains its products from an area within ten miles while the other goes beyond ten miles for a portion of its products, that the Administrator cannot legally provide by regulation that an individual employed in an establishment in the *actual* area of production is not so employed simply because some part of the products handled by the establishment are obtained from farms more distant than ten miles, that the definition is void and unenforceable because it makes arbitrary, unfair and discriminatory distinctions between establishments so as to allow to some the exception given to them by Congress under Section 13(a)(10) and to take away these exceptions from others.

In that case, in which Respondent was a party, we have specific findings by the Court as to the citrus industry, the same industry involved in this case.

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

The Court held any limitation upon the number of employees is invalid and should be regarded as surplusage.

Caliup v. *Terrell Cotton Warehouse Co.*, District Court of Texas:

There the Court held the Administrator acted out of his sphere in making the area of production depend upon the number of employees, saying:

> "That is an attempt to ingraft upon his authority something that the Congress did not give him authority to do. It did not give him the right to say that the number of persons who were engaged in storing, shall determine whether this exemption is operative or not."

The Judge further stated that he thought the bill was aimed at those who were at distant points and who were engaged in profit-making as middle men.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43, Eastern District of Texas:

In the conclusions of law, the District Judge said that the limitation as to the number of employees in an establishment or engaged in operations named in the exemption is void.

Fleming v. *Farmers Peanut*, Fifth Circuit, 128 F. 2d 404:

This case and the case at bar are the only decisions of a Circuit Court of Appeals on this point and the Court in both cases held very definitely that the limitation of the number of employees in the establishment had nothing whatsoever to do with defining "area of production" and, therefore, held such limitation void.

Byus v. *Traders Compress Company*, Western District of Oklahoma:

There the Court held the definition in its entirety invalid.

Walling v. *McCracken County Peach Growers Association*, Western District of Kentucky:

The Court said that the Administrator exercised his authority unreasonably in restricting the exemption to

those employees where the number of employees did not exceed ten and, therefore, the limitation of the number of employees void, saying,

> " 'Area of production' deals primarily with geographical territory and necessarily includes all employers within the geographical limits so set up."

Shain v. *Armour & Company*, Western District of Kentucky:

Following the *McCracken County Peach Growers Association case, supra*, the Court held the limitation of the number of employees to be invalid.

Rafael Bruno v. *The Hills Bros.*, District Court of Puerto Rico:

The Court said,

> "to define 'area' in terms of number of employees seems to me a clear extra-limitation of his power by the Administrator. Area of production has nothing to do with the number of workmen."

Holt et al. v. *Barnesville Elevator Company*, District Court of Minnesota:

This Court specifically held the limitation as to the number of employees invalid.

Therefore, ten courts have specifically held the limitation void.

3. Cases Holding the Limitation As to the Number of Employees Valid.

Gordon v. *Paducah Ice Manufacturing Company*, 41 Fed. Supp. 980:

The Court stated that the record threw no light upon the history or origin of the Administrator's definition, nor did it disclose what facts were considered by the Administrator. He, therefore, presumed the Administrator had exercised his legal authority in a reasonable and proper

manner and that he was not prepared to hold the limitation void.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88—Southern District of Texas:

Although the ruling of the Court is by no means clear, we place the case in this category because the court stated that he was unwilling to say that the limitation of the number of employees was invalid; yet, he finally held the employees were within the area of production, although the defendant had more than ten employees. The decision is somewhat confusing.

Therefore, we have two district courts that have said they are unwilling to hold the limitation void, and the total score now stands 10 to 2 in favor of holding the limitation void.

4. Decisions Holding Void the Restriction As to Location of the Plant in a Town of Less Than 2,500.

Lake Wales v. *Andrews*, District Court of Florida:

The District Court specifically held that

"the population of a city or town in which the plaintiff's establishments are located cannot and does not have any reasonable relation to the question of whether or not such establishments are located within the area of production of Florida citrus fruit."

This finding was undisturbed by the appellate court.

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

The Court said that no legal basis could be suggested for the requirement that the establishment within the area of production be located within or without the corporate limits of a town of 2,500 or more population and held this limitation void.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43:

The Court said that any requirement that the place of employment be located within or without a city having a certain population had no reasonable relation to a valid definition of area of production.

Jesse Carpenter v. *Waxahachie Cotton Warehouse,* Texas Court of Appeals:

This case involved a cotton warehouse located in a town of approximately 9,000 population. A portion of the time involved was covered by the regulation containing the population criterion and the Court disregarded this portion of the definition and held that the services were performed within the area of production of the raw cotton.

Walling v. *McCracken County Peach Growers Ass'n,* Western District of Kentucky:

Although the Court did not specifically rule upon the population criterion, it did hold the employment to be within the area of production after finding that the employer had its establishment in a city of approximately 33,000 population.

Bruno v. *The Hills Bros.,* District Court of Puerto Rico:

The Court specifically held that part of the Administrator's definition restricting the location of the establishment to a town of 2,500 population or less to be invalid.

As this restriction that the plant must be located within a town of 2,500 or less population in order to be in the area of production remained a part of the definition for only a short time, it can readily be understood why this point was not passed upon by any of the other decisions.

5. Decisions Holding Valid the Restriction As to Location of the Plant In a Town of Less Than 2,500.

There are no decisions falling in this classification unless it be *Silgaro* v. *Port Compress, supra,* wherein the Court said he was unwilling to say that the Administrator might not reasonably classify compresses as to location "(*i. e.,* whether in open country, rural community, town or city, etc.)" However, in that case the establishment was located in the city limits of Corpus Christi, a city with a population of approximately 75,000 and the Court held that the employer was within the area of production and entitled to the exception.

Six District Courts have held the population criterion void—one doubtful.

6. Cases Holding the Ten Mile Haul Limitation Void.

Lake Wales Citrus Growers Ass'n v. *Andrews,* District Court of Florida:

The Court held the ten mile haul limitation void.

Fleming v. *Farmers Peanut,* 37 Fed. Supp. 628:

The Court said no legal basis can be suggested for defining "area of production by arbitrarily prescribing a circular area having a radius of ten miles, as applied to peanut crops in the Southeastern peanut producing area."

Clark v. *Jacksonville Compress Company,* 45 Fed. Supp. 43:

The Court held the Administrator had no authority to prescribe a condition, qualification, restriction or limitation, such as the requirement that the commodities come from farms within ten miles.

Jesse Carpenter v. *Waxahachie Cotton Warehouse*:

The first definition was involved for a portion of the time which contains the ten mile haul limitation. The

Court points out that during the period of the employment, approximately 5,600 bales were stored in the warehouse and that all of the cotton was produced in farms in the general vicinity or trade territory with the exception of some 500 which came from beyond the ten mile radius of the town. The Court held the employer was within the area of production.

Byus v. *Traders Compress Company*, Western District of Oklahoma:

The Court held that where the cotton received was from points more than 175 miles distant, it came from the general vicinity of the compress, and held the definition promulgated by the Administrator to be capricious, arbitrary and entirely void.

Holt et al. v. *Barnesville Farmer Elevator Co.*, District Court of Minnesota:

This is a well reasoned opinion involving grain. The Court does not specifically state that the ten-mile haul is invalid but it does hold that where the grain was obtained from within a distance of 20 to 25 miles, it was in the immediate locality, which the Administrator defined to mean ten miles.

7. Cases Holding the Ten Mile Haul Limitation Valid.

None.

Since the ten mile haul limitation constituted the definition of "immediate locality" which was in effect for a period of only some 60 days, although contained in an alternative definition in the second definition, there are only six cases involving this specific point, all holding the limitation void.

8. Cases Construing "General Vicinity."

Although several of the courts have criticised this expression as being most indefinite and ambiguous, none

of the judges have found it necessary to pass directly upon its validity, being content to applying the particular facts of the case to such expression giving it a wide and liberal construction. These cases are:

Fleming v. *Farmers Peanut*, 37 Fed. Supp. 628:

In this case, involving peanuts, it was shown that approximately 70% of the commodity came from farms within a radius of ten miles and, except for a negligible percentage, the rest came from farms within a radius of 25 miles. The Court held that the same came from the "general vicinity" of the establishment.

Fleming v. *Farmers Peanut Company*, 128 F. 2d 404:

The appellate Court said,

> "that part of the definition which speaks of materials all coming from farms in the general vicinity of the establishment, though not very precise, is a legitimate defining of an area of production of agricultural commodities * * * an indefinite definition may well be given a broad application"

and agreed with the lower court in finding that the peanuts came from farms in the general vicinity of the establishment.

L. Metcalfe Walling v. *The Peacock Corporation*, Eastern District of Wisconsin:

The Administrator was seeking an injunction. The employer claimed exemption under Section 13(a)(10). The opinion sets forth the facts showing that the plant is located in Wisconsin handling onion sets which are produred from a rather small concentrated area in Wisconsin, from another area in Illinois, and also some from the State of Colorado, and that some 30 to 40 miles separate the producing areas in Wisconsin and Illinois. The particular definition involved was the one providing for general vicinity and the limitation of ten employees (this lat-

ter element not being involved in the case). The definition by the Administrator was not attacked in that case and the Court held that under the facts, the employee was not within the area of production because of the great distances from which the commodities were obtained.

Clark v. *Jacksonville Compress Company*, 45 Fed. Supp. 43:

The Court found that all of the cotton was received from within 75 miles of the establishment and, therefore, within the general vicinity, finding that only 10% originated within ten miles, and various percentages up to 75 miles.

Gordon v. *Paducah Ice Manufacturing Company*, 41 Fed. Supp. 980:

Strawberries were involved in this case and the Court held that since they were grown on farms in the same county where employer's establishment was located and not adjoining counties, the commodity came from the general vicinity.

Remington v. *Shaw*, Western District of Michigan:

Grain was obtained by the defendant from farmers within an area of from 30 to 35 miles and the Court held this was within the general vicinity.

Silgaro v. *Port Compress Company*, 45 Fed. Supp. 88:

This decision involved the definition using the term "general vicinity" and the Court found that 90% of the cotton came from five designated counties known as "The Coastal Bend Area of Texas." The Court held the employees were within the exemption.

Dean Cox v. *Swift & Company*, Northern District of Texas:

The commodities were obtained from a radius of not more than 60 miles and the Court held this was within the general vicinity.

Walling v. *Yeakley*, District Court of Colorado:

The Court held the limitation of general vicinity was fair and reasonable but, since the defendant obtained some 18% of its product from counties far removed—some 300 miles distant, the employer was not within the general vicinity.

Walling v. *McCracken County Peach Growers Ass'n*, Western District of Kentucky:

The peaches involved in that case were all received from a radius of approximately ten miles.

Bruno v. *The Hills Bros.*, District Court of Puerto Rico:

The commodity consisted of grapefruit and pineapples grown on a strip approximately ten miles wide and 100 miles long along the northern central coast of the island. The Court held this within the general vicinity.

Holt et al. v. *Barnesville Farmer Elevator Co.*, District Court of Minnesota:

Some 98% of the commodity was obtained from within 15 miles of the establishment and the balance at various ranges up to 25 miles which the Court held was within the general vicinity.

9. Cases Generally Holding Definitions Void.

Most of the cases passed on one or more of the elements of the definitions but

Byus v. *Traders Compress Company*, Western District of Oklahoma,

generally holds the definition promulgated by the Administrator to be capricious, arbitrary and entirely void and

that the employees in that case, where the cotton was obtained not more than 175 miles distant from the compress, were within any reasonable definition of area of production and within any valid definition of that term which might be promulgated by the Administrator.

10. CASES GENERALLY HOLDING DEFINITIONS VALID.

Fleming v. *Lincoln Loose Leaf*, Eastern District of Tennessee:

The memorandum for judgment fails to set forth the facts but the Court holds that the defendant is not exempt because its employees worked within the area of production. From the memorandum, it is impossible to state whether the definitions were attacked in that case or what the facts were upon which the Court based this conclusion.

Walling v. *Home Loose Leaf Tobacco Warehouse*, Eastern District of Kentucky:

Although the Court did not pass upon the validity of the definitions, it did hold that since 20% of the total volume of the commodity handled came from other states and from Kentucky counties, remote from the establishment, the employer did not obtain its commodities from the general vicinity.

It is, of course, realized that decisions by District Courts are not binding on this Court but, by referring to these cases, we do find the trend of judicial thinking.

The vague and indefinite regulations which have been many times changed and amended, have given rise to litigation all over the country and the large number of judges of the District Courts have almost unanimously held the definitions arbitrary, capricious and void. In the foregoing list of cases, there are a few where the courts very properly did not pass upon the validity of the definitions because of the particular facts of the case, some where the number of employees was less than seven,

some where the commodities were obtained from such a far distance that the employer could not be within any reasonable definition of area of production. However, where it has been necessary for the courts to squarely rule upon the validity of these definitions, we find, with one or two exceptions, a unanimity seldom reached by the judiciary. The only Circuit Court of Appeals which has passed on these definitions has added its endorsement and squarely taken its place among those holding the number of employees limitation absolutely void. The first time the Court of Appeals made such a ruling in the *Farmers Peanut case, supra*, the Administrator was a party to that suit but did not even file a petition for certiorari to this Court. If, as he says in this brief *amicus curiae*, the decision in this case is of such importance to him, why did he not ask this Court to rule upon the point the first time it was decided by the Circuit Court of Appeals?

(g) Findings of the District Court.

In order to give a complete adjudication of the points at issue, it may be necessary for this Court to consider some of the facts not specifically covered in the opinion of the Circuit Court of Appeals. As an example of this situation, we call attention to the fact that the District Court made findings and rulings involving the claimed exemption of 14 weeks under Section 7(c) and the claimed exemption under Section 7(b)(3) of the Act. In view of the conclusion reached by the Appellate Court, it became unnecessary to consider these conclusions at all.

Some of the findings of the lower court were in conflict with admitted facts in the case and there was practically no conflict in the testimony; some of the findings were based upon erroneous conclusions of law. Exceptions to the findings of the lower court were amply preserved by the Respondent to the Appellate Court.

It is recognized that this Court will not set aside findings of a lower court unless clearly erroneous, but it is sub-

mitted that the findings and conclusions of the District Court were clearly erroneous in the following particulars:

1. First, the Court finds that the Respondent operated a commercial canning plant (R. 186). If by that the Court means that the Respondent was not a cooperative, then it is in direct conflict with the evidence because the evidence shows it was incorporated as a cooperative—Exhibit A (R. 150)—handling fruit for the account of its members and, in addition, purchasing fruit and all of the profits inured directly to the benefit of its members. The Appellate court so found (R. 224).

2. In paragraph VII (R. 192), the court finds that the Respondent "throughout said two seasonal periods of operation" did not obtain all of its commodities from farms in the "immediate locality" or "general vicinity" as defined by the Administrator. In the first place, the Court failed to recognize the fact that "immediate locality" definition only covered the first five months during which time "immediate locality" was undefined by the Administrator, and that for the last 30 to 40 days "immediate locality" was defined as meaning ten miles and within a town of 2,500 or less population (The Administrator evidently realized the phrase "immediate locality" was too indefinite in itself and needed some defining). "General vicinity" is just as indefinite but he has never attempted to define it.

It is well to remember that the Fair Labor Standards Act is at all times to be construed by the workweek. The Administrator has stated that the plant may be in the area of production one week and out of the area next week, dependent primarily upon the distance of the haul, and in his regulations, among other things, he has stated that an employee must be construed to be under the Act during the entire work week if he performs services during any part of the week which are subject to the Act. Therefore, to justify the Court in holding the Respondent was not

within the "area of production" during the two seasonal periods of operation, he must make a finding as to each work week therein.

3. In paragraph VII (R. 192), he finds "an appreciable portion thereof came from a distance beyond the range of usual farm travel." This is in direct conflict with the *admitted* facts in the case which were alleged in paragraph 3 of the Fifth Defense (R. 13, 144). Thus the uncontradicted evidence shows the range of usual farm travel to be at least 100 miles and the evidence likewise conclusively shows that *all* of the products used by the Respondent during the entire two seasons were obtained many miles nearer the establishment than the range of usual farm travel. In said paragraph VII, the Court likewise finds that the general vicinity of the Respondent's establishment is not sparsely settled because there were several towns and communities within a radius of ten miles and that some of the fruit used came from varying distances up to 20 miles. *If* the Court construes "immediate locality" in the first definition to mean ten miles and *if* the Court holds such a definition to be valid, then the very small portion (less than 3%) came from beyond ten miles during the first season. Therefore the plant would not be within "area of production" for any work week in which it obtained fruit from beyond the ten miles. However, even in a circumstance like this, the rule of *de minimis* would certainly apply. It will be noted that the Court did not make any findings as to the respective seasons, and all during the second season the establishment was operated under a "general vicinity" definition.

4. In Paragraphs VIII (R. 192) and G of said order (R. 196), the Court finds that the establishment of the Respondent was not within the area of production because there was located within the range of usual farm travel "at a point not more than four miles away" a town of more than 2,500 population. Admittedly, Haines

City, a town of slightly in excess of 2,500, is located some 4 miles from Respondent's establishment but it was never intended that this should prevent the establishment from being within the "area of production." Nowhere in any interpretations, rulings, or orders of the Administrator, nor in any Court decision have we found such a contention. A mere reading of the Administrator's definition clearly convinces one that the Administrator never so intended and we again urge the Court to bear in mind that the population criterion could apply only to some 30 or 40 days of the first season. His definition of "open country" or "rural community" as contained in the amendment is "shall not include any city or town of 2,500 or greater population." He did not say it should not include a location within ten miles or within the range of usual farm travel of a town of 2,500 or more. Certainly, the Administrator in his zeal to delimit the phrase "area of production" never intended such. Undoubtedly, he was attempting to exclude from the exception those plants located in large cities with a source of labor supply non-competitive with the rural sections.

5. In paragraph IX (R. 193) of the findings of fact and paragraph F of the conclusions of law (R. 196), the Court reaches the conclusion that the ten mile haul in the definitions means "by the shortest available road route, but not a radius distance 'as the crow flies' from the plant."

In rural sections some roads may be used at times and other roads at other times dependent upon the weather, as well as many other causes. If the lower court is correct, then a farmer before hauling his fruit to a cannery must go out and measure the road distances to the cannery to determine which, if any, are within the ten miles, also ascertain whether any of the roads will be closed or impassable, and, with such information, then determine to whom he will sell his fruit. If a body of water lies between the grove and the plant, necessitating a circuitous route of eleven miles, although the grove may

be located many miles nearer, that fruit does not come from the area of production. If one grove owner has access to a direct road to the canner while his neighbor does not, then we find one grove in the area of production while the neighboring grove is not. If two groves are equidistant from the plant but the road to one is straight and his mileage is less than ten miles, he is in the "area of production" while the road leading from the other grove may have curves which lengthen the average road mileage to an excess of ten miles and thereby throws him out of the "area of production." Numerous other examples could be given to show the fallacy of such a holding.

6. In paragraph A of the conclusions (R. 194), the Court decides that if the several applicable definitions of "area of production" are void, the Respondent is not entitled to the exemptions under Section 13(a)(10).

The Court of Appeals in the *Farmers Peanut case, supra,* clearly answered that contention when it said "But if we ought to hold the entire definition void, we say that a failure to define would not enable the Administrator to prevail. It may be that the Court cannot define for him, but it should withhold its aid in the effort to override the exception which needs his definition, until he meets the need lawfully. To do otherwise would be to flout the expressed will of Congress."

The trial judges in *Fleming* v. *Farmers Peanut Company,* 37 Fed. Supp. 628, *Walling* v. *McCracken Peach Growers Asso., supra,* and *Shain* v. *Armour & Company, supra,* discussed the effect of holding a portion of the definitions invalid and reached the conclusion that the exemption provided by Section 13(a)(10) could not be taken away or defeated by an invalid definition and in effect said that the operations were within any reasonable definition of area of production. The other district courts holding the entire or parts of the definitions invalid have simply ruled that the operations were within the area of production.

Judge Yankwich, in *Redland Foothills Groves* v. *Jacobs, supra,* by *obiter dictum* stands alone on the theory of the petitioners that there is no exemption unless and until the Administrator has promulgated a valid definition of area of production.

The Congress gave the exemption and the Administrator cannot thwart the expressed will of Congress by withholding the definition or by failing and refusing to promulgate a reasonable definition in accordance with his duties under the Act.

7. In paragraph D of the conclusions (R. 195) the Court holds that the limitation of the number of employees in the definitions is valid and at other places in this brief the Respondent has shown clearly that such conclusion of law is erroneous.

8. In paragraph E of the conclusions (R. 196) the lower court attempts to justify its failure to follow the decision of its own appellate court in the *Peanut Case, supra,* in connection with the number of employees limitation by saying that the factual circumstances are different without designating the differences whatsoever. The only difference is that this is a suit by employees and the Peanut Case was a suit by the Administrator. If the limitation as to the number of employees is void against the Administrator, it is likewise void against any persons claiming the benefit thereof.

9. In Paragraph H of the conclusions (R. 196) the Court holds that because in the Fifth Defense as amended, which is an affirmative defense based upon area of production, this Respondent did not specifically say that another provision of the Act was complied with, the Respondent thereby admits a violation of the other provision. However, the Court overlooked the fact that this Respondent in the Second Defense denies any violation of the Act. Even before the adoption of any Federal Rules of Procedure a defendant could file inconsistent defenses; the new rules clearly so provide (Rule 8 (e)). Therefore,

the Court came to the conclusion that the Respondent was not within the area of production because it had violated some provision of the Act; that one expressly exempt from the provisions of an Act loses his exemption if he does not comply with the Act. Under such a theory, no establishment operating within the "area of production" could ever claim its exception if it violated any other provision of the Act—in short, no employer could ever be exempt under Section 13(a)(10).

10. Finally, in Paragraph I of the conclusions (R. 197) the Court holds in effect that a canning establishment can never be within the "area of production" if it is in competition with other canning establishments or if a farmer in the vicinity is doing any canning. There is nothing in the Act, the definitions, or any interpretations that would warrant such a holding. If the same be true, any canning establishment can be put out of the area of production by the simple expedient of having a neighboring farmer start canning some of his own products.

Finally, may we again urge the fact that the entire findings of fact and conclusions of law were erroneous in not recognizing and conceding that there were two seasons involved and two different definitions and the amendment involved. By attempting to apply the "immediate locality" definition to the two seasons, he has completely overlooked the fact that this definition did not extend beyond the first season. Again, we emphasize the fact that the Wage and Hour Act must be interpreted on a work week basis, not on a monthly basis nor a seasonal basis. The issue before the lower court was whether the defendant was within or without the area of production during *each* of the work weeks involved. The lower court just wiped this aside and treated it from a standpoint of the total period involved in the suit.

(h) Administrative Hearings.

Petitioners refer to the hearings of the Wage & Hour Division and particularly to an administrative hearing conducted by Mr. Merle D. Vincent, on behalf of the Administrator, which is the only hearing involving citrus.

Mr. Vincent's findings and recommendations were rendered on March 14, 1939. He points out that the scope of the hearings was "what, if any, amendment should be made of Section 536.1 or Section 536.1 of the regulations issued under the Fair Labor Standards Act of 1938 in respect with the definition of 'area of production' for fresh fruits and vegetables." Then he emphasized the fact that the breadth of the problem was reflected in the widely representative capacity of the persons who appeared at the hearing. His findings consist of approximately thirty-four pages and his recommendations of one page.

There is contained in the findings:

"In Florida, where the citrus acreage is spread over a large part of the State, average hauls are frequently longer and maximum hauls go up to two hundred and fifty miles in some cases."

"In Florida, the normal, rather direct movement from farm to nearby packing house, is somewhat distorted in some instances by a choice of packing house with reference to further shipment."

"The important Florida citrus canning industry, operating for about six months a year, procures part of its citrus direct from the groves and part from packing houses. There are only 50 citrus canneries in the State in comparison with 350 packing houses; accordingly some fruit is hauled to the canneries over 200 miles and the average haul is longer than the haul to the packing house."

"While there may be some home canning with equipment operated by 7 or fewer persons, it is the opinion of all witnesses that any commercial cannery must employ a greater number of persons. The

actual number of employees varies greatly" (This is the only reference to the number of employees limitation.)

"The definition to be adopted must therefore be directed toward the relation of the plant to the farmer with the three qualifications of (1) geographical immediacy, (2) rural character of the community in which the plant is situated, and (3) relation of cost factors to the farmer's income for his produce."

His recommendations are that Section 536.2 of the Regulations issued under the authority of Section 13(a)(10) of the Fair Labor Standards Act of 1938 be further amended by the addition thereto of the following:

"(e) with respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, drying, storing, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or a rural community, and obtains its products from farms in its immediate locality and performs such operations for the account of the grower of such product.

"As used in this sub-section (e) 'open country' or a 'rural community' shall not include any city of *twenty-five thousand* or greater population according to the 15th United States Census, 1930, and 'immediate locality' shall not include any distance of more than *fifty miles*, provided, however, that if the establishment is located in a somewhat larger city or obtains the products from a somewhat greater distance, and the nature of the business and the type of operations are similar to those in competitive establishments included within the 'area of production' under this sub-section, the Administrator may determine that such establishment is also in the 'area of production' on the basis of an individual application."

With these recommendations before the Administrator, he issued his regulation of April, 1939, changing the recommendation of the twenty-five thousand population

to twenty-five hundred and cutting down the recommendation of the fifty-mile haul to ten miles.

Respondent does not question the fact that the several Administrators have fully realized the several definitions of area of production were not sufficient and have made repeated changes or amendments. It is contended, however, that none of these definitions or amendments were promulgated with any reasonable effort to carry out the intentions of Congress but all show an underlining purpose of delimiting the granted exception under Section 13(a)(10) to an extent never contemplated by Congress.

Neither does Respondent contend that the Administrator did not hold any hearings or have any conferences with representatives of the industry. From the time of the first definition in October, 1938, the citrus industry has made repeated efforts to get a reasonable definition and this industry participated in the hearings by Mr. Vincent, above referred to. However, all conferences and hearings have been to no avail. The Biblical quotation, "For what is a man profited, if he shall gain the whole world and lose his whole soul?" might be very applicable to the situation here. What good has been accomplished, what relief granted even though numerous hearings and conferences may have been had from time to time? The requirement that hearings be had by Administrative bodies has many times been emphasized by this Court. To emphasize our point, we suggest the following absurd example: suppose the Administrator had said that the area of citrus is a circle with the trunk of the tree as the center and a radius of two feet, and that every individual in the citrus industry had appeared before the Administrator, after which he had amended his definition of area of production so that the area of production would extend three feet from the trunk of the tree instead of two feet; the fact that a hearing had been had would not make such a definition valid. If the definitions of the Admin-

istrator involved in this case are invalid because they are in conflict with the Act and with the legislative intent, are arbitrary and capricious, the fact that testimony was taken by the Administrator does not breathe validity into such definitions.

(i) Proper Elements to Be Considered by the Administrator in Promulgating Definitions.

It is not thought that this or any other court will assume the responsibility and duty of the Administrator by defining "area of production" for him. This is his duty and not that of the Court.

However, with the state of confusion that now exists throughout these United States caused by the Administrator's continuous efforts to delimit the exemption granted by Congress and thereby assuming legislative prerogative and with the Administrator saying to this court in his *amicus curiae* brief that he is in a quandary as to what to do, it certainly would be to the interest of the public if this Court would announce some of the proper elements which ought to be considered by the Administrator in promulgating a definition that would stand attack in the courts. Judge Waller, in his concurring opinion (R. 228-231), fully recognized this situation and has expressed, beginning on page 230, several factors that might be of assistance to the Administrator in performing his duty.

We have at all times felt that Congress intended separate definitions applicable to each commodity, or at least to a group of commodities rather than one definition for the entire country. If Congress had intended the latter, it would have defined area of production itself. It is fully realized that the area of production of the commodities in the wide open spaces of this country is entirely different from that in the more thickly populated areas. It is recognized that the producing area for cotton, corn, peanuts, onions, citrus and other commodities varies in expansion which is governed almost entirely by nature. The Ad-

ministrator says that different definitions for different commodities are not practical because the task is difficult. The amount of effort necessary to comply with the instructions of the Congress is no criterion to be considered by the Administrator and cannot be used as an excuse for his failure to perform his duties.

Florida is blessed with a network of fine roads running through the citrus belt which situation fully explains the admitted fact in this case that the range of farm travel is in excess of 100 miles throughout the area of production of citrus in this state. The groves are situated throughout 39 counties (R. 13) with a few scattered groves in other counties. Packing houses, canning plants, and waste disposal plants are likewise situated throughout these counties, having been established at points near the producing areas.

The District Judge in *Cox* v. *Swift & Company, supra,* fully appreciated the thoughts that we have attempted to express when he said:

> "Congress found it difficult or impossible to define same within a reasonable space, otherwise it would not have delegated that authority to the Administrator. On the other hand, the Administrator himself even found it very difficult, if not an impossible task, to make the area of production certain by any definition. In fact, it strikes me as being impossible for it ever to be defined to make it apply to any and every situation that might arise. This follows for the obvious reason that the 'area of production' in states more or less sparsely settled and of great distances would not be workable in densely populated areas, for example, like in the states of New England. We can readily appreciate the difficulty of making one definition to fit all the area of production in the United States."

Judge Nordbye in *Holt* v. *Barnesville Farmers Elevator Company, supra,* emphasized the fact that good roads lead to the establishment of the employer for many miles

out in the country and the farms from which the employer received its commodities were located on and near these roads. He also emphasized the capacity of the establishment for handling the commodities.

The District Judge in *Bruno* v. *Hills Bros, supra,* commented upon the size of the island where the grapefruit was grown, the availability of canning plants, the density of population, the complete network of roads, and the preponderance of agriculture on the island.

In determining what elements are proper to be considered by the Administrator, it must at all times be borne in mind the intent of the Congress was not only to exempt the farmer from the operation of the Act but also to exempt it from the immediate effects of the Act; that it intended to refrain and did refrain from adding to the farmer in the preparation and marketing of his crop, any burden and expense which might be caused by the Act.

With this clear intention in mind, the elements suggested by Judge Waller are necessarily factors to be taken into consideration in carrying out the intent of Congress. These he lists as (R. 23) "(a) availability of other canning plants; (b) freedom of access by good roads; (c) capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) quantity of produce raised in the area in relation to plant capacity; (g) and in case of a cooperative cannery (as in the present case) the location of the members of the cooperative." He further points out, "there are many factors of far more relevancy or pertinency than the number of employees or the population of the town in which located, or the radius of an arbitrary circle" (R. 231).

We are confident that all parties to this litigation, as well as the thousands upon thousands of employees and employers who do not know and cannot know their rights and obligations under Section 13(a)(10) of the Act, would heartily approve any statements by this Court that would clarify this most confusing situation.

2. Partial Exemption Under Sections 7(c) and 7(b)(3).

Heretofore, our comments have been directed solely at Section 13(a)(10) of the Act because we confidently believed the same to be the main issue in this case. A ruling that the Respondent was within the area of production and, therefore, entitled to the benefits of the exemption under Section 13(a)(10) will, of course, dispose of this litigation but should the Court not so hold, it then becomes necessary to rule upon the claimed partial exemptions. These exemptions apply only to the hours provision of the Act and have nothing whatever to do with the minimum wage provisions.

Although the lower court ruled upon these two points, the same were not mentioned in the opinion by the Circuit Court of Appeals because that Court reached the conclusion that the Respondent was not subject to the Act.

As we understand the prior decisions of this Court, the case might be remanded to the Circuit Court of Appeals for a ruling on these two points or, in order to do complete justice and avoid unnecessary delay in litigation, these points might be handled by this Court. Undoubtedly, the latter procedure would be preferable and agreeable to the parties litigants.

Section 7(c).

Section 7 of the Act provides for the payment of time and a half after 44 hours during the first year of the Act, after 42 hours during the second year of the Act; and after 40 hours thereafter (App. 81). Paragraphs (b) and (c) of Section 7 contain numerous exemptions from the overtime provisions and the particular provision relied upon by this Respondent is an exemption not to exceed 14 workweeks in the aggregate of any calendar year to an employee "or in canning, or packing, perishable and seasonal fresh fruits or vegetables." Following the provisions just quoted, we find a similar provision to an em-

ployee "or in the first processing within the 'area of production' (as defined by the Administrator) or any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock."

Petitioners have not appreciated the fact that this Respondent is claiming the fourteen weeks exemption under the first quoted provision and that area of production had nothing whatsoever to do with this exemption. The Congress gave the exemption to employees engaged in canning seasonal fresh fruits or vegetables. It likewise gave an exemption to employees engaged in first processing within the area of production. Respondent is not claiming the exemption on the theory that the employees were engaged in "first processing." Respondent was canning seasonal fresh fruits and, therefore, entitled to that exemption.

During the calendar year of 1938, the Respondent operated approximately 7 workweeks after the effective date of the Act (R. 147). It, therefore, claims the benefit of the quoted portion of Section 7(c) of these seven workweeks. In other words, if the contention of the Respondent is correct, it is not liable to the employees for any overtime during those 7 workweeks.

During the calendar year 1939, it operated 21 workweeks (R. 147 where 21 is erroneously shown as 31—a computation of the weeks between the dates shown will show that 21 weeks is correct) as to fourteen of these workweeks, this Respondent claims that it is not liable for the time and a half overtime because of the quoted section of Section 7(c). If this contention be correct, there is left a total of 7 workweeks during which the Respondent would have claims for the overtime.

During the 1940 season, the plant was in operation for a period of some 13 workweeks and this Respondent claims an exemption for overtime during the entire thirteen (13) workweeks under Section 7(c).

Therefore, if this Court should hold that the services of the Petitioners were subject to the requirements of the Act during the two seasons involved, there would only be a period of 7 workweeks involved overtime.

This partial defense was set forth by the Respondent in its fourth defense (R. 12) which was stricken by the Court (R. 198). The action of the Court was founded upon its order of January 26, 1943, findings, paragraph F (R. 200) which findings may be summarized as follows:

1. Respondent is not entitled to claim the exemption because it failed to designate the workweeks during which time it is claimed the exemption applied.

These workweeks were not designated at that time because (a) the Respondent believed that it was within the area of production and exempt from the Act and (b) the District Court of the Southern District of Florida, in *Lake Wales* v. *Janes, supra*, had declared this Respondent to be exempt from the Act and enjoined the enforcement of the Act, which injunction remained in force and effect throughout the two seasons involved in this case.

The lower court in *Missell* v. *Overnight Motor Transportation Co.*, 40 Fed. Supp. 174 (thereafter in this Court as *Overnight Motor Transportation* v. *Missell*, 316 U. S. 572, 86 L. Ed. 1682), considered the failure of the employer to keep its records in compliance with the Act and pointed out that its failure so to do was excused by reason of the fact that the District Court of the District where the employer was located had rendered a decision to the effect that employees, such as the employees in the Missell case, were not subject to the provisions of the Act and that this decision had not been reversed. The situation is very similar to our case because the District Court had rendered a decision that this Respondent was not under the Act and the case had not been reversed, although it was later reversed by the Circuit Court of Appeals on a jurisdictional question.

The Court can readily understand the position of this employer during the time of the injunction in the *Janes case, supra.* The Administrator would not submit to the jurisdiction of the District Court and, therefore, as held by the appellate court, the employer was helpless to obtain a declaratory judgment.

The Administrator would not file within the District a suit to enjoin any alleged violation of the Act so that the Respondent could obtain an adjudication of its rights. Was the employer to designate on its books the workweeks it claimed under Section 7(c) and run the risk of having it contended that he had waived any provisions under 13(a) (10)? Under the confused situation caused by the definition of the Administrator, what was the employer to do?

It is respectfully submitted that if this Honorable Court should hold the services of the Petitioners were covered by the Act, the defendant is entitled to the exemption from the overtime penalties as set forth herein.

2. The District Court held the Respondent in this particular defense did not deny the violation of the Act.

As we have heretofore pointed out, the Respondent in its second defense (R. 7) (10) had denied any violations.

3. That the claim for exemption under Section 7(c) is inconsistent with the claim for exemption under Section 13(a) (10).

Assuredly, a defendant may plead inconsistent or alternative defenses. The Respondent contended that under Section 13(a) (10) it was not bound by the Act in any manner. In its Fourth Defense, it in effect said that if the Act did apply it was entitled to the partial exemption.

4. That the designation of the partial 14 weeks to be exempt is a matter of agreement between the employer and the employee and the Respondent fails to allege any joint designation.

To state this point is to answer it. There is nothing in the Act, in the history of the legislation, or in any of the numerous regulations of the Administrator to warrant any such idea. According to this theory, no employer could ever use such an exemption because it is inconceivable that an employee would deliberately forego any compensation to which he might be entitled.

5. Where the employer has already settled with the employee without claiming the exemption under 7(c), he cannot go back and claim that exemption.

This point needs no argument and to follow the District Judge's theory, an employee could never ask for overtime because the account had been settled and closed.

As we understand the findings of the lower court, the services of the Petitioners fell within the exemption but the Respondent cannot claim the same.

Very little litigation has arisen involving Section 7(c). However, the Circuit Court of Appeals for the Seventh Circuit, in *Walling* v. *Swift & Co.*, 131 F. 2d 249, dealt with this section and held that the employer was entitled to apply the exemption to each of its employees.

Section 7(b)(3).

In addition to the fourteen workweeks exemption set forth in Section 7(c), Congress likewise granted a further exemption of not more than 14 workweeks in an industry found by the Administrator to be of a seasonal nature but even during these workweeks, time and a half had to be paid for services in excess of 12 hours in any work day or in excess of 56 hours in any workweek. This is commonly referred to as the partial exempt weeks. This contention set forth in the third defense (R. 10-12) was likewise stricken by the Court (R. 201) primarily on the ground that the Administrator did not make his determination that the citrus industry was of a seasonal nature until August 24, 1940, which was a date subsequent to the pe-

riods in controversy in this cause (R. 199). This brings us back to a thought heretofore urged with reference to the definition of area of production, *i. e.*: Can the Administrator withhold an exemption granted by the Act by refusing to perform his duties?

The pleadings show that there had been no change in the seasonality of the industry, in the mode of operations or any other changes that made the situation different during the seasons referred to in this suit than they were at the time of the determination by the Administrator. The citrus industry is admitted highly seasonal and is uniformly so recognized. The fruit must be handled when ripe. Certainly, the employer is not to be penalized, is not to be deprived of his exemption granted by Congress because the Administrator delays or fails to make his finding. There is no question that the industry is seasonal. The only question is whether the Administrator can make it nonseasonal by refusing to declare it seasonal. Suppose the Administrator had arbitrarily said that the industry was not seasonal and suppose, further, that long drawn out litigation over a period of years was necessary to correct this error. Justice would require a holding that the employer not be deprived of his rights during such a time.

Petitioners contend that an employer is not entitled to the exemptions under both Sections (c) and (b)(3) of Section 7. The Administrator in his release 974, states:

> "It is the position of the Administrator that the exemptions in Section 7(b)(3) and (c) may operate consecutively as a matter of law."

Congress recognized that there are peak weeks in a seasonal industry during which time the commodity must be handled as rapidly as possible, during which time long hours are absolutely necessary to preserve the fruit and it, in effect, said that during fourteen workweeks of any calendar year, an employee could run long hours when en-

gaged in canning seasonal fresh fruits—Section 7(c). This was to take care of the peak weeks. Congress likewise recognized that during other times in the season, it was necessary to run hours longer than the minimum hours set forth in the Act, and, therefore, granted an additional exemption under Section 7(b)(3), provided the hours did not exceed 12 hours in one day or 56 hours in one week.

IV. CONCLUSION.

Because of the many points involved in this litigation, it has been necessary to prepare a rather lengthy brief but when it is boiled down there are only a few prime points:

1. Were the services of the Petitioners rendered within the area of production?

2. If these services were not within the area of production is the employer entitled to the benefit of the total 14 weeks exemption from the overtime provisions of the Act?

3. If the services were not within the area of production, is the employer entitled to the benefit of the partial exempt weeks?

In deciding the first point, the Court must consider the validity of the definitions promulgated by the Administrator, the validity of the different factors or limitations considered in these definitions and the effect of invalidity of portions of the definitions.

It is respectfully submitted that the Respondent has shown that the definitions involved and each of them are severally invalid as being unconstitutional, arbitrary, capricious, and exceeding the authority of the Administrator, that the services of the Petitioners were performed within the actual area of production of citrus and would fall within any reasonable and valid definition of area of production.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A.

Definitions of Area of Production.

(1) The Administrator promulgated on October 20, 1938, Section 536.2 of the Regulations, purporting to define "area of production" as follows:

> "Section 536.2 'Area of Production' As Used in Section 13 (a) (10) of the Fair Labor Standards Act. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products,
>
> (a) if he is engaged in such work on a farm and on agricultural or horticultural commodities produced exclusively on such farm, or
>
> (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employes in such establishment does not exceed seven."

(2) That regulation remained in effect through April 19, 1939, when (following a series of administrative hearings,) he promulgated, effective April 20, 1939, an additional paragraph to said Regulation 536.2, as follows:

> "(e) with respect to perishable or seasonable fresh fruits and vegetables, if he is engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning such products for market in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality. As used in this subsection (e) 'open country' or 'rural community' shall not include any city or town of 2,500 or greater population according to the 15th

United States Census, 1930, and 'immediate locality' shall not include any distance of more than 10 miles."

(3) On June 15, 1939, effective June 17, 1939, the Administrator again amended said Regulation, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing, or

(d) if he performs those operations on materials all of which come from farms in the immediate lo-

cality of the establishment where he is employed and the establishment is located in the open country or in a rural community. As used in this subsection (d), 'immediate locality' shall not include any distance of more than ten miles and 'open country' or 'rural community' shall not include any city or town of 2500 or greater population according to the 15th United States Census, 1930."

(4) On July 23, 1940, effective October 1, 1940, the Administrator again amended said Regulation as follows:

"II. An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10), in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonal fresh fruit or vegetables for market:

if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

(5) On March 12, 1941, effective April 1, 1941, the Administrator again amended said Regulation as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishments where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this sub-section (b),

'first concentration point' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment normally receiving a portion of the beans assembled or from other first concentration points, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in handling, packing, storing, and drying such tobacco for market in an establishment which is a first concentration point for such tobacco. As used in this sub-section (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

(6) On October 6, 1941, effective January 5, 1942, the Administrator again amended said Regulation, as it is now currently in effect, as follows:

"An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(a) If he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten, or

(b) with respect to dry edible beans, if he is so engaged in an establishment which is a first concentration point for the processing of such beans into standard commercial grades for marketing in their raw or natural state. As used in this subsection (b), 'first concentration point,' means a place where such beans are first assembled from nearby farms for such processing but shall not include any establishment

normally receiving a portion of the beans assembled from other first concentration, or

(c) with respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling unstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition. As used in this subsection (c), 'first concentration point' means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing."

APPENDIX B.

Maximum Hours.

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board, which provides that the employee shall not be em-

ployed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.